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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

TRANSPORTATION MANAGEMENT CORP.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF COUNCIL ON LABOR LAW EQUALITY URGING REVIEW BY THE COURT AND OTHERWISE SUPPORTING THE VIEWS OF RESPONDENT

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Pettibone Corporation v. NLRB
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Wright Line, a Division of
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MISCELLANEOUS AUTHORITIES

William H. DuRoss, "Toward
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IN THE
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On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The First Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF COUNCIL ON LABOR LAW EQUALITY URGING REVIEW BY THE COURT AND OTHERWISE SUPPORTING THE VIEWS OF RESPONDENT

To The Honorable, The Chief Justice and The Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(3) of the Rules of this Court, the Council On Labor Law Equality (COLLE) moves this Court for leave to file the attached brief as amicus curiae urging the Court to accept the National Labor Relations Board petition for certiorari but otherwise supporting the position of Respondent Transportation Management Corp. on the merits of the questions involved. In support of this motion, the Council On Labor Law Equality shows as follows:

1. The Council On Labor Law Equality (COLLE) is a national association of large and small employers formed to monitor the activities of the National Labor Relations Board and other developments relating to the NLRA and to give support in those cases or on those issues which affect a broad section of industry. COLLE was formed in recognition of the necessity for a specialized and continuing business community effort to provide assistance in the review of

NLRB and court decisions in order to maintain a balanced approach in the interpretation of national labor policy.

2. The questions presented for review in this case -- dealing with the burden of proof and the burden of persuasion in "dual motive" discharge cases -- is an issue that has been of particular concern to the Council On Labor Law Equality. Within the last year, COLLE has filed three separate briefs amicus curiae urging the Court to accept this question for review. Such briefs amicus curiae were filed in Wright Line, a Division of Wright Line, Inc. v. NLRB, 251 NLRB 1083; 662 F.2d 899 (1st Cir. 1981); cert. denied March 1, 1982, No. 81-987, ___ U.S. ___; Red Ball Motor Freight, Inc. v. NLRB, No. 81-1605, cert. denied May 24, 1982, ___ U.S. ___; Pettibone Corporation v. NLRB, No. 81-2116, cert. denied October 4, 1982, ___ U.S. ___. In each of the aforementioned cases, the questions presented to the Court were virtually identical. In each of the aforementioned cases, the National Labor Relations Board opposed review on the ground that the issues at that time

were not yet ripe for review.

3. In Red Ball Motor Freight, Inc. v. NLRB, supra, Justices White and Rehnquist issued a dissenting opinion indicating that they would grant review because questions presented in Red Ball, supra, squarely presented a ..."conflict on what is obviously a recurring issue that should be resolved."

4. The NLRB in its petition urging review in the instant case cites as support the aforesaid dissent from the denial of certiorari by Justice White in Red Ball, supra.

5. The members of COLLE, a cross section of large and small employers, consider the question of burden of proof and persuasion in NLRB dual motive discharge cases to be one of the most important questions confronting employers. The Government now has demonstrated by the instant petition that it concurs in the importance of this question and concurs that there are conflicting opinions of various courts of appeal that require the resolution of this important question. It is respectfully suggested

that the special interest of the amicus curiae, Council On Labor Law Equality, should be granted because while they concur with the position of the Government in urging that the questions presented be reviewed, they take serious exception to the other positions taken by the Government in their petition which tend to give support to the NLRB's "Wright Line" test under which employers must carry the ultimate burden of demonstrating that they did not have "just cause" for discharging an employee. As the Council On Labor Law Equality will take positions before this Court that in part are in agreement with the Government (in urging review), in part are in agreement with Respondent on the merits of the argument, and in part are in agreement with the decision of the First Circuit, it is respectfully urged that these additional positions to be urged upon the Court by COLLE should be heard.

6. The Solicitor General has granted consent to the filing of the instant brief amicus curiae urging the Court to

grant the petition, a copy of which has been lodged with the Clerk's office. Counsel for the Respondent, Transportation Management Corp., has indicated that his client is unwilling to grant consent as they are opposing the grant of certiorari in the instant matter.

WHEREFORE, it is respectfully moved that the Council On Labor Law Equality be granted leave to file the accompanying brief amicus curiae in this case.

Respectfully submitted,

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Council On Labor
Law Equality (COLLE)

October 22, 1982

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

NO. 82-168

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

TRANSPORTATION MANAGEMENT CORP.,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The First Circuit

BRIEF AMICUS CURIAE ON BEHALF OF COUNCIL ON LABOR LAW EQUALITY URGING REVIEW BY THIS COURT AND OTHERWISE SUPPORTING THE VIEWS OF RESPONDENT

This brief amicus curiae on behalf of the Council On Labor Law Equality is submitted contingent upon the Court's granting of the accompanying motion, pursuant to Rule 42(3) of the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

The interest of the amicus curiae is detailed in the preceding motion for leave to file a brief amicus curiae.

SUMMARY OF THE CASE

The Council On Labor Law Equality (COLLE) concurs with the Petitioner National Labor Relations Board that

> "The question presented in this case is of considerable practical importance to the administration of the National Labor Relations Act and the decision of the court of appeals squarely conflicts with the decisions of five other courts of appeal."

See NLRB Petition at p. 7.

The decision of the First Circuit below reaffirms the position of the First Circuit taken in Wright Line, a Division of Wright Line, Inc. v.

NLRB, 251 NLRB 1083; 662 F.2d 899 (1st Cir. 1981); cert. denied March 1, 1982, No. 81-987, ___U.S.___, in refusing to adopt the Board's then new "Wright Line" test for affixing the burden of proof in dual motive discharge cases. The facts in Transportation Management Corp. are typical of the kinds of questions that arise in these dual motive discharge cases. An employer discharges an employee for "just cause"; the NLRB determines that the employer also had knowledge that the employee so discharged was a union activist. It is the employer's position in this case that the appropriate standard here contrary to the standard urged by the NLRB is the standard that has been found to be appropriate by the Court in discharge cases, the same standard set forth by the Court in Texas Department of Community Affairs v. Burdine, 450 U.S. 240 (1981). It is respectfully suggested that one of the reasons the Court should consider accepting this case for review is so that it can determine the need for accommodation of the Burdine standard in discrimination

cases and the NLRB's current Wright Line standard. It is the position of COLLE that in view of the explicit language in the National Labor Relations Act permitting an employer to discharge an employee for just cause that where an employer, as in the instant case, sets forth a justifiable business reason for the action taken, the NLRB has not sustained its statutory burden.

The instant brief will outline why the allocation of the burden of proof in NLRB unfair labor practice cases is ripe for review and suggest the need for a uniform burden of proof and related questions presented in Connick v. Myers, No. 81-1251, cert. granted March 8, 1982, and will suggest the need for an appropriate accommodation between the Court's apparently divergent views on the question of the burden of proof as expressed in Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977), and as contrasted to Texas Department of Community Affairs v. Burdine, supra. The argument will explore why each of the aforementioned factors require that

review be granted at this time.

I

REASONS FOR GRANTING THE WRIT

The NLRB's Wright Line Standard Shifting The Burden Of Proof Of Persuasion Upon Employers Is One Of The Most Important Questions Confronting Employers Upon Which The Courts Of Appeals Are Divided And Which Is Contrary To The Design Of The Statute

The petition by the NLRB in the instant case is the fourth time within the last year that the question of the appropriate burden of proof in unfair labor practice discrimination cases has come before this Court [1]. The instant

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[1] COLLE has filed a brief amicus curiae urging review of this question in Wright Line, a Division of Wright Line, Inc. v. NLRB, 251 NLRB 1083; 662 F.2d 899 (1st Cir. 1981); cert. den. March 1, 1982, No. 81-987, ___U.S.___; Red Ball Motor Freight, Inc. v. NLRB, No. 81-1605, cert. den. May 24, 1982, ___U.S.___; Pettibone Corporation v. NLRB, No. 81-2116, cert. den. October 4, 1982, ___U.S.___. On each of the aforesaid occasions, the NLRB has opposed review for the reason that the issue was not at that time ripe.

case is the first time the NLRB urged the Court to accept this question for review. COLLE, the amicus curiae herein, urges that the Court review these questions, in agreement with the position of the Government, that these are important questions and that the decision below "squarely conflicts with the decision of five other courts of appeal." (See p. 7 of the Petition and discussion following, pp. 7 - 10).

In Wright Line, a Division of Wright Line, Inc. v. NLRB, supra, the question was presented in the context of the overall importance of the issue and the failure of the First Circuit to follow the "dominant motive" test which had been the test followed by that Circuit for many years. It was the position of Wright Line, as supported by COLLE, that the Board's newly adopted Wright Line doctrine in reliance upon the Court's Mt. Healthy decision, supra, was simply a recasting of the prior "in part" test. It continues to be the position of COLLE that the Board and its General Counsel continue to adhere to a standard that

places the burden upon the employer to prove that no part of alleged discriminatory conduct is for a reason protected under Section 7 of the Act [2].

In Wright Line, supra, the opposition of the government suggested that the issue was not yet ripe for review as most of the courts of appeal were following the Board's "Wright Line" test. The Government, in the instant petition, contrary to its opposition in Wright Line, now urges the Court to accept the case for review. COLLE pointed out in its brief amicus curiae in Red Ball, supra, that even those courts of appeal that have adopted the Board's Wright Line approach have not clearly recognized it to be a departure from the "in part" analysis that had previously been the Board's standard.

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[2] The First Circuit in the instant case reaffirms its decision in Wright Line and the Government in the instant petition urging review has apparently reversed its prior opposition filed in the Wright Line case because of the intervening decisions by other courts of appeal rejecting the NLRB's

In Red Ball, the government again principally adopted the opposition it had prepared in Wright Line as the basis for its successful opposition to the granting of review. Red Ball was the first case in which the Court of Appeals had taken direct issue with the views of the First Circuit in Wright Line.

COLLE, which represents a cross-section of large and small employers throughout the United States, fully concurs in the dissenting views expressed by Justice White and Justice Rehnquist in their Memorandum in Red Ball Motor Freight v. NLRB, supra. The dissenting views of Mr. Justice White correctly articulate the division in the circuit courts on the question of whether or not it is the employer or the General Counsel that has the final burden of persuasion in an unfair labor practice case and correctly suggests that this is an important issue that should be resolved.

Wright Line approach. See Behring International, Inc. v. NLRB, 675 F.2d 83 (3d Cir. 1982); NLRB v. Webb Ford, Inc., decided 9/27/82, No. 81-3022, 7th Cir., ___F.2d ___.

In view of the Government's recognition in its petition that the dissenting views of Justices White and Rehnquist should now be followed, COLLE respectfully suggests that the Court once again consider the importance of these questions and agree to grant review[3].

II

THE NLRB'S WRIGHT LINE STANDARD IS INCONSISTENT AND IN CONFLICT WITH THE DECISIONS OF THIS COURT

A. The NLRB Wright Line Standard Is An Improper Variation Of The Mt. Healthy Standard

In Wright Line v. NLRB, supra, the Board ostensibly backed away from the "in part" test and claimed to be adopting the test set down by this Court in Mt. Healthy Board of Education v. Doyle, supra. Under the Court's Mt. Healthy burden of proof standard, an employee who is the alleged discriminatee bears

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[3] COLLE does not agree with the arguments presented by the Government in its petition except to the extent that the Government acknowledges the conflict in the circuits and acknowledges the importance of resolving that conflict.

the burden of establishing a threshold showing that the conduct in question is protected and was a "...substantial or motivating factor in the actual discharge." 429 U.S. at 286. Mt. Healthy suggests that the appropriate standard in measuring the burden of proof should be the "dominant motive" test. A true Mt. Healthy test contemplates a dominant motive analysis. See "Toward Rationality In Discrimination Discharge Cases, The Impact Of Mt. Healthy Board of Education v. Doyle Upon The NLRA," 66 Georgetown Law Journal 1109 (1978). William H. DuRoss, now Associate Solicitor, U. S. Department of Labor, analyzed this Court's Mt. Healthy decision in terms of the divergent views of the various circuit courts and correctly concluded that the ..."proper balance between the employer's ... right to exercise control over his work force and the employee's right to be protected from discrimination based on pro-union activity" ... is the "dominant motive" test as articulated by the Court in Mt. Healthy in the context of the First

Amendment and as set forth by the First Circuit in NLRB v. Whitten Machine Works, 204 F.2d 883 (1st Cir. 1953), enforcing 100 NLRB 279, 66 Georgetown Law Journal 1109, 1110, 1111 and 1114. In Whitten Machine, the First Circuit placed the burden of proof in dual motive discharge cases upon the NLRB holding that an employee's discharge would violate the Labor Act only when the protected activity ... "weighed more heavily on the decision to fire [the employee] -- than did the dissatisfaction with his performance ...", 204 F.2d 883 at 887. Mr. DuRoss, in his Law Review Article, aptly points out that the First Circuit ten years later in NLRB v. Lowell Sun Publishing, 320 F.2d 835, reversing in part 136 NLRB 206 (1967), held that in applying the "'dominant motive' standard ... the Board must prove that 'but for' pro-union activity, the employer would have considered the employee's misconduct grounds for discharge." 66 Georgetown Law Journal at 1111.

The best analysis of what the Board's Wright Line approach really is can be found in the 45th Annual Report of the NLRB for the year 1980, in which the Board places its Wright Line standard in perspective. See Exhibit A attached to this Brief. In this annual report, the Board refers to the Mt. Healthy test as requiring that:

> ... the General Counsel to make a prima facie showing sufficient to support the inference that an employee's protected conduct was a motivating factor in the employer's disciplinary action. Once this is established, the burden will then shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

See Exhibit A-1. The Board, thus, has shifted away from the "but for" analysis called for in Lowell Publishing and has shifted away from a strict following of Mt. Healthy by merely requiring that some evidence be established by the General Counsel from which an "inference" could be

drawn that the proscribed conduct was a motivating factor. The "but for" test, rather than being placed upon the Board, is placed upon the employer. This is not a correct "dominant motive" test and not a correct Mt. Healthy standard. The Board's Annual Report acknowledges that its interpretation of Mt. Healthy does not include an adoption of the "dominant motive" test (see attached Exhibit A-3). The Board acknowledges in the Annual Report that:

> ... under the "dominant motive" test, the General Counsel not only has to establish a prima facie showing of unlawful motive but he is also required to rebut the employer's asserted defense by demonstrating that the discharge would not have taken place place in the absence of the employee's protected activities.

Exhibit A-3 attached.

We respectfully suggest that the "dominant motive" test is the test that is consistent with the statutory design of the Labor Act rather than the Board's Mt. Healthy interpretation. We submit that the Board improperly relied upon Mt. Healthy as being consistent with NLRB v.

Great Dane Trailer, Inc., 388 U.S. 26. The Board's 1980 Annual Report states:

> ... "the shifting burden process in Mt. Healthy was consistent with the process envisioned by Congress (and the Supreme Court's Decision in Great Dane)."
> [See attached Exhibit A-3 & 4.]

We respectfully suggest, consistent with the views of Mr. DuRoss and his learned Law Review article, that in Great Dane the Court in fact removed the burden of proof from the NLRB only in a limited group of cases in which "the employer's discriminatory conduct could be inherently destructive." 66 Georgetown Law Journal 1109 at 1126.

B. The Tension Between Texas Dept. of Community Affairs v. Burdine And Mt. Healthy Should Also Be Resolved In NLRB Discrimination Cases

The Court has granted certiorari in Connick v. Myers, No. 81-1251, on March 8, 1982. In Connick v. Myers, the Court will decide the appropriate standard and burden of proof with regard to the dismissal of a public employee. The Petitioner in

Connick correctly urges that there is need to resolve the conflict between Burdine and Mt. Healthy. Similarly, in the private sector, in matters involving the NLRA, the tension between Mt. Healthy and Burdine must be addressed. It is especially appropriate to review the instant case as a related case to Connick v. Myers as the NLRB in its Wright Line standard has relied upon the Court's Mt. Healthy decision. The amicus curiae respectfully suggests that Burdine more accurately reflects the appropriate burden of proof required under the National Labor Relations Act. In considering the tension between Mt. Healthy and Burdine, the Court will also have the opportunity of considering the appropriateness of the "dominant motive" standard as originally enunciated by the First Circuit rather than the Board's current interpretation of Mt. Healthy.

CONCLUSION

For the reasons set forth herein, COLLE respectfully urges that the instant petition of the NLRB for certiorari should be granted.

Respectfully submitted,

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October 22, 1982

B. Employer Discrimination in Conditions of Employment

1. Proof of Discriminatory Motivation

In Wright Line, a Div. of Wright Line,[56] the Board formally set forth a test of causation, based on an analysis akin to that used by the Supreme Court in Mt. Healthy[57] for all cases alleging violations of section 8(a)(3) or violations of section 8(a)(1) turning on employer motivation. In adopting what it referred to as the Mt. Healthy test, the Board stated tht it first shall require the General Counsel to make a prima facie showing sufficient to support the inference that an employee's protected conduct was a motivating factor in the employer's disciplinary action. Once this is established, the burden will then shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

After discussing the distinction between pretext and dual motive, the "in part" test, and the advent of the "dominant motive" test and the law of the

[56] 251 NLRB No.150 (Chairman Fanning and Members Penello and Truesdale, Member Jenkins concurring).

[57] Mt. Healthy City School Dist. Bd. of Education v. Doyle, 429 U.S. 274 (1977).

courts, the Board examined the Mt. Healthy case, where an untenured teacher had brought suit against the school board, alleging that it had wrongfully refused to renew his contract. The district court found that of the two reasons cited by the school board for its action, one involved unprotected conduct while the second was clearly protected by the first and fourteenth amendments. The district court reasoned that since protected activity had played a substantial part in the school board's decision, its refusal to renew the contract was improper and the teacher was, therefore, entitled to reinstatement and backpay. After the court of appeals affirmed, per curiam, the Supreme Court reversed, in a unanimous opinion, rejecting the lower court's application of such a limited "in part" test and ruling that the school board must be given an opportunity to establish that its decision not to renew would have been the same if the protected activity had not occurred. Thus, in the Board's view, the Court established the two-part test, described above, to be applied in a dual-motivation context.

The Board concluded that Mt. Healthy represents a rejection of the "in part" test which stops with the establishment of a prima facie case or a consideration of an improper motive. It also found that the "dominant motive" test fared no better because Mt. Healthy shifted the burden of proof to different parties. Under the "dominant motive" test, the General Counsel not only has to establish a prima facie showing of unlawful motive, but he is also required to rebut the employer's asserted defense by demonstrating that the discharge would not have taken place in the absence of the employees' protected activities. However, under Mt. Healthy, after the General Counsel establishes a prima facie case of employer reliance on protected activity, the burden shifts to the employer to demonstrate that the decision would have been the same in the absence of protected activity. In the Board's view, this distinction is a crucial one since the decision as to who bears this burden can be determinative.

After considering the legislative history of the Act and the Supreme Court's

decision in Great Dane [58], the Board concluded that the shifting burden process in Mt. Healthy was consistent with the process envisioned by Congress and the Supreme Court to resolve discrimination cases. Further, it pointed out that, although not couched in the language of Mt. Healthy, this is the same process that the Board has sought to use in analyzing such issues. Thus, the Board's decisional process traditionally has involved, first, an inquiry as to whether protected activities played a role in the employer's action and, if so, a subsequent inquiry as to whether any legitimate business reason asserted by the employer is sufficiently proven to be the cause of the discipline to negate the General Counsel's showing of prohibited motivation.

Perhaps most important for its purposes is the fact that the Mt. Healthy procedure accommodates the legitimate competing interests inherent in dual-motivation cases, while at the same time serving to effectuate the policies and objectives of section 8(a)(3) of the Act.

[58] N.L.R.B. v. Great Dane Trailers, 388 U.S. 26 (1967).

Under this test, the aggrieved employee is afforded protection since he or she is only required initially to show that protected activities played a role in the employer's decision, while the employer is provided with a formal framework within which to establish that the discipline or other action would have occurred absent the employee's protected activities. Further, the Board found it to be of substantial importance that its explication of this test of causation will serve to alleviate the confusion which now exists at various levels of the decisional process by providing litigants and the decisionmaking bodies with a uniform test to be applied in 8(a)(3) cases. Finally, the Board recognized that inherent in the adoption of the Mt. Healthy test is its recognition of the advantage of clearing the air by abandoning the "in part" language in expressing its conclusion as to whether the Act was violated without repudiating the well-established principles and concepts which have been applied in the past.

In applying the Mt. Healthy test to the facts in the instant case, the Board found that the General Counsel had made a prima facie showing that the employee's union activity was a motivating fact in the employer's decision to discharge him, and that the employer failed to demonstrate that it would have taken the same action against the employee in the absence of his engaging in union activities. For these reasons, they agreed with the administrative law judge's finding that the employer violated section 8(a)(3) of the Act.

Concurring Member Jenkins was willing to apply the shifting burden-of-proof standard his colleagues adopted in this case. Although finding that this standard may suffice for most cases, he stated that there may remain a residue, perhaps small, of cases of mixed motive or cause, where the purposes are so interlocked that it is not possible to point to one of them as "the" cause. Where the evidence does not permit the isolation of a single event or motive as the cause of the discharge, Member Jenkins concluded that the unlawful motive must be deemed to be part of the

cause of discharge, and the discharge is unlawful. In his view, it is fair that the party who created this situation, in which isolation of a single cause is impossible, bear the burden created by the venture into an area prohibited by the Act. Member Jenkins therefore found that the "in part" standard as distinguished from the "but for" and "dominant motive" tests is the only criterion which will effectuate the purposes of the statute. Noting that the legislative hsitory shows plainly that Congress itself struck this balance, he read Mt. Healthy as also in effect adopting this standard. His only reservation now is the way in which the shifting burden-of-proof standard may be applied to prevent unlawful conduct. If experience shows it to be inadequate in application, he believed that modification may be required.